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No. 99-1884

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IN THE

Supreme Court of the United States

LACKAWANNA COUNTY DISTRICT ATTORNEY; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioners,

v.

EDWARD R. COSS, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

WILLIAM P. O'MALLEY*
Assistant District Attorney
EUGENE M. TALERICO
First Assistant District Attorney
ANDREW J. JARBOLA, III
District Attorney
LACKAWANNA COUNTY DISTRICT ATTORNEY'S OFFICE
Lackawanna County Courthouse
200 North Washington Avenue
Scranton, Pennsylvania 18503
(570) 963-6717

* *Counsel of Record* *Attorneys for Petitioners*

163650

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Does the custody requirement of the federal habeas corpus statute preclude, under all circumstances, a challenge upon a fully expired conviction that was used to enhance a current conviction under habeas attack and for which the prisoner is presently in custody?

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1. Recent congressional enactments which purport to place a strict one-year time limitation upon applicants for federal habeas relief tend strongly to support the proposition that the answer to the question left open by *Melang v. Cook* should be that a habeas petitioner does not remains "in custody" under a conviction after the sentence imposed for it has fully expired merely because the prior conviction has been or might be used to enhance the sentences imposed for any subsequent crime of which he is convicted with the sole possible exception of cases wherein the record discloses that there was a complete denial of defense counsel in the prior proceeding. 10

2. Through analysis of the error, or not, in the rationale upon which the court of appeals grounded its decision, there emerges an independent array of reasons why the custody requirement of the federal habeas corpus statute should be held to preclude, under all circumstances, a challenge upon a fully expired conviction that was used to enhance a current conviction under habeas attack and for which the prisoner is presently in custody. 15

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OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals For the Third Circuit, filed February 29, 2000, which reversed the United States District Court for the Middle District of Pennsylvania and conditionally granted the petition for habeas corpus is reported at 204 F.3d 453 (3d Cir. 2000) and is unofficially reported at 2000 WL 225898 (3d Cir.(Pa.), Feb 29 2000) (No. 98-7416). A copy of said opinion is set forth in the Appendix to the Petition for a Writ of Certiorari [Pet. App.] on pages 1a to 49a

A previous opinion entered on June 28, 1999 by the United States Court of Appeals for the Third Circuit, would have reversed the United States District Court for the Middle District of Pennsylvania, but for different reasons, and would have conditionally granted the petition for habeas corpus. Said opinion has not been officially published, but is unofficially reported at 1999 WL 495123 (3d Cir.(Pa.), Jun 28, 1999) (No. 98-7416), Pet. App. 50a-93a.

By order dated July 30, 1999, rehearing was granted, the previous opinion of June 28, 1999 (Appendix pages 50a to 93a) was vacated and the cause was listed for rehearing *en banc*, resulting in the opinion entered on June 28, 1999 (Appendix pages 1a to 49a). This order dated July 30, 1999 has not been officially published but is unofficially reported at 1999 WL 566730 (3d Cir.(Pa.), Jul 30, 1999) (No. 98-7416), Pet. App. 94a.

The orders and memorandum opinion of the United States District Court for the Middle District of Pennsylvania denying the instant habeas petition are unpublished, Pet. App. 95a to 121a.

STATEMENT OF JURISDICTION

Jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2241(c)(3), which provides:

> The writ of habeas corpus shall not extend to a prisoner unless —
>
> * * *
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a), which provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

Respondent Edward R. Coss, Jr. brought this habeas corpus action pursuant to 28 U.S.C. § 2254. The United States Court of Appeals for the Third Circuit reversed the District court's denial of relief and conditionally granted habeas corpus relief by opinion and order entered on February 29, 2000. Rehearing of such judgment was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Respondent is a multiple criminal offender whose extensive criminal history was recognized and detailed by the Court of Appeals, Pet. App. 24a-26a. These habeas corpus proceedings raise claims of constitutional error based upon isolated segments of that criminal history upon which respondent relies to support for his federal habeas contentions that:

(a) because one of his former convictions, a 1986 conviction for simple assault, for which he is no longer incarcerated or under any parole restraint, was tainted by constitutional infirmity arising as the result of ineffective assistance of trial counsel, and

(b) because that former 1986 conviction for simple assault was improperly considered when he was sentenced for a subsequent offense, the term of incarceration for the subsequent offense violates respondent's constitutional rights.

The former conviction occurred in 1986 following a jury trial for simple assault. It resulted in a two year prison sentence which began in 1986 and ended in 1988 at which

time respondent was released from prison. Thus, long before the present habeas proceedings began, respondent was no longer serving any sentence for the 1986 simple assault conviction; the sentence for that conviction had been fully served.

Subsequently, in 1990, respondent was tried and convicted in the Pennsylvania courts for an offense which occurred following his release from prison and which was entirely unrelated to the 1986 simple assault conviction for which his state prison sentence had already been completed. Respondent contends (and the court of appeals, on a basis which is not entirely clear, Pet. App. 10a-11a, agrees with such contention) that his current sentence which he presently is serving for the unrelated 1990 conviction was enhanced by reason of his long-since-completed 1986 conviction. Based upon respondent's further claim that the trial resulting in his 1986 conviction was tainted by ineffective assistance of trial counsel, respondent argues that the sentence for his 1990 conviction was adversely and unconstitutionally affected by the 1986 simple assault conviction, entitling him to federal habeas relief.

Respondent's federal habeas corpus proceedings were commenced by a *pro se* petition filed September 15, 1994, J.A. 1a [dkt #1]. On July 13, 1995, the Federal Public Defender was appointed to represent respondent, J.A. 8a [dkt #32], and on November 29, 1995 a counselled amendment to the habeas petition was filed on respondent's behalf. J.A. 11a [dkt #44]. A second amended habeas petition was filed by respondent's counsel on November 7, 1996. J.A. 19a [dkt #72]. Like its predecessor pleadings this second amendment challenged only respondent's 1986 conviction, making no mention of the 1990 conviction or sentence.

The United States District Court for the Middle District of Pennsylvania denied the amended petition finding that although respondent's counsel in the trial leading to the 1986 conviction rendered objectively deficient performance, no prejudice had been shown. Pet. App. 95a-96a. The court explained (Pet. App. 105a-108a.) that it had jurisdiction to entertain the challenge to the 1986 conviction because "Coss maintains that his current sentence [based on charges unrelated to the 1986 convictions] was adversely affected by the 1986 convictions because the sentencing judge considered these allegedly unconstitutional convictions in computing Coss' present sentence." Pet. App. 105a-106a.

The court of appeals disagreed with the district court's conclusion that prejudice had not been shown and reversed with instructions to the district court that it order a writ of habeas corpus to issue conditioned upon Coss being resentenced without consideration of the 1986 conviction. Pet. App. 51a. The court of appeals subsequently vacated its previous opinion and granted rehearing en banc. *Id.* at 94a.

On rehearing the court reversed the district court on the same grounds as the previous opinion had, but changed the type of relief to be granted. With respect to its jurisdiction, the court interpreted *Maleng v. Cook*, 490 U.S. 488 (1989), as holding that a petitioner "satisf[ies] the 'in custody' requirement for federal habeas corpus jurisdiction when he asserts a challenge to a sentence he is currently serving that has been enhanced by the allegedly invalid prior conviction." Pet. App. 12a. The court based its finding that it had jurisdiction to order the writ upon Coss' contention "that the sentence for his 1990 conviction was adversely affected by the 1986 simple assault conviction." *Id.* at 12a-13a. The court excused the exhaustion requirement because

Coss' PCHA petition had been pending for seven years, *Id.* at 13a, and also recognized that Coss had not "presented the Pennsylvania state courts with his claim that the invalid 1986 conviction was used to enhance his subsequent conviction in 1990," but concluded that collateral relief for that sort of claim was not available under the PCHA or other state post-conviction remedies, thereby excusing the exhaustion requirement. *Id.* at 13a-14a.

On the matter of relief the court of appeals stated that the "normal relief we grant in habeas corpus is to order that the habeas petitioner be freed, subject to the right of society to correct in a timely manner the constitutional error through a new state proceeding." Pet. App. 22a. The court observed that Coss could not be "freed" from his 1986 conviction because he had already served his time. Rejecting Coss' contention that the only available remedy was to require the state to re-sentence him under the 1990 conviction, *id.* at 23a, the court extended to the state the option of re-trying Coss for the 1986 offense. *Id.* at 28a. The court explained that Coss would have to be resentenced under this 1990 conviction in any event but stated that "comity requires us to afford the Commonwealth the opportunity to cure the original constitutional defect." The court expressed no opinion as to whether Pennsylvania law permits such a retrial. *Id.* at 28a-29a & n.14. Two judges dissented and two judges concurred in part and dissented in part. This Court granted certiorari on October 10, 2000.

SUMMARY OF ARGUMENT

Petitioners' argument has been divided in two parts.

In the first part of argument, petitioners seek to demonstrate that recent amendments to the federal habeas statute do not suggest any intention by Congress that the words of the "custody" provisions should be accorded any meaning other than their plain meaning. The class of persons who are persons "in custody" means just what it says. If the Congress had intended that the class should be expanded to include a greater breadth of persons it would have provided for actions by persons claiming to have been "convicted" in violation of the Constitution rather than the more limited class of persons "in custody" in violation of the Constitution.

The recent amendments to the federal habeas statute were enacted by Congress well after this Courts decisions in *Maleng v. Cook*, 490 U.S. 488, 492, 109 S. Ct. 1923, 1926, 104 L. Ed. 2d 540 (1989) and *Custis v. United States*, 511 U.S. 485, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994). Both *Maleng* and *Custis* contain language which might be interpreted as creating exceptions to the "custody" requirement of the habeas statute, yet Congress made no effort to engraft any such exceptions into the amendment. The failure of Congress to have done so suggests an intention by Congress to preclude any challenge upon a fully expired conviction for which the prisoner is no longer in custody that was used to enhance a current conviction under habeas attack and for which the prisoner is presently in custody.

In the second part of their argument petitioners approach the question presented in these proceedings from a different perspective.

By pointing out, and analyzing in some detail, what petitioners believe to be the plain error inherent in the analytical approach undertaken in this case by the court of appeals, there emerges a fresh set of reasons, each independent of the other and additional to congressional intent, for why the question presented in these proceedings should be answered in the manner urged by petitioners. This fresh set of reasons, in the order developed, include the following:

The court of appeals, while paying lip service to the holding of *Maleng* actually made its pivotal ruling in this case in a manner which misinterpreted and is in diametric opposition to the actual holding in *Maleng*.

In its analysis of *Maleng*, the court of appeals also appears to have overlooked at least one unique circumstance of Mr. Maleng's case which is not a circumstance here; Maleng was "in custody" by reason of an outstanding detainer which had been lodged against him. Additionally Mr. Maleng's sentence, unlike Mr. Coss' sentence, was not fully expired; Maleng hadn't even yet begun to serve the sentence in question and would not begin to serve it until after the conclusion of his present unrelated period of incarceration.

A second aspect of the decision by the court of appeals which petitioners believe contributed to error in the decision of that court was the court of appeals' unwillingness to be guided by this Court's post-*Maleng* decision of *Custis*. Rather than heeding any of the interpretive aspects of *Custis* which might have been helpful, the court of appeals rested its decision upon its own "collateral consequences" rule developed for the Third Circuit in *Young v. Vaughn*, 83 F.3d

72, 78 (3d Cir. 1996) (holding that "a prisoner may attack his current sentence by a habeas challenge to the constitutionality of an expired conviction if that conviction was used to enhance his current sentence). Petitioners argue that the court of appeals also erred in viewing its rule of "collateral consequences" as being buttressed by *United States v. Tucker*, 404 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972).

Four additional and independent reasons for answering the question presented in these proceedings in the manner urged by petitioners emerge when the court of appeals' analysis of *Tucker* is closely examined:

First of all, in *Tucker* comity was not the important consideration which it is here.

Secondly, *Custis* held that *Tucker* is only relevant (constitutionally) when a violation of *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 1252 (1963) is established, which is not the case here.

In the third place, *Tucker* predated *Maleng*, which viewed the question presented as left open. Because the *Maleng* Court plainly did not believe that *Tucker* already had resolved the question presented, the court of appeals should not have done so either.

In the fourth place, the *Tucker* case was brought by a federal prisoner under the provisions of 28 U.S.C. § 2255 whereas here the habeas petition was brought by a state prisoner under the provisions of 28 U.S.C. § 2254.

Petitioners conclude this aspect of their analysis with the observation that because the ultimate result in *Tucker*

was dependent, almost entirely, upon the absence of any state officials as parties to the *Tucker* case (an obviously distinguishing factor) the vitality of the "collateral consequences" rule promulgated in *Young v. Vaughn*, *supra*, is not supported by *Tucker* in any event, finally pointing out that the "collateral consequences" rule, as announced in *Young v. Vaughn*, *supra*, is plainly at variance not only with the rationale expressed in *Custis* but also with the holding of *Maleng*.

ARGUMENT

1. **Recent congressional enactments which purport to place a strict one-year time limitation upon applicants for federal habeas relief tend strongly to support the proposition that the answer to the question left open by *Malang v. Cook* should be that a habeas petitioner does not remains "in custody" under a conviction after the sentence imposed for it has fully expired merely because the prior conviction has been or might be used to enhance the sentences imposed for any subsequent crime of which he is convicted with the sole possible exception of cases wherein the record discloses that there was a complete denial of defense counsel in the prior proceeding.**

The pertinent statutes, 28 U.S.C. §§ 2241 and 2254, do not expressly authorize collateral attacks on expired state sentences used in later sentencings. Instead the statutes provide for an action by a person "in custody in violation of the Constitution or laws or treaties of the United States."

Obviously, Congress intended the "custody" requirement to have its plain meaning, thereby restricting the class of

cases to which habeas jurisdiction would extend; otherwise it would have provided for an action by a person claiming he was "convicted" in violation of the Constitution. If the "custody" requirement instead allows challenges to sentences on which a prisoner is not in custody, but which were simply used in a subsequent sentencing proceeding, then the plain meaning of the words used by Congress is being ignored and the statutory language has virtually no effect.

Recent changes[1] in the federal habeas statute emphasize the point. After long concern about stale attacks on state convictions, Congress has now acted to require a prisoner to seek federal habeas review within one year after his conviction becomes final. The recent changes to the federal habeas statute do not directly suggest that Congress intended any exceptions to the statutory provisions as amended.

The omission of Congress to write any exceptions[2] into the newly-created one year period of limitations, coupled

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1. 28 U.S.C. § 2244(d)(1) as amended Apr. 24, 1996, Pub. L. 104-132, Title I, §§ 101, 106, 110 Stat. 1217, 1220 now provides: "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."

2. As Chief Justice Marshall first noted, unlike the common law, where the court's power to issue a habeas writ was an inherent one, in the American system, judicial authority to grant the writ flows solely from the statutory grant. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 2 L. Ed. 554 (1807). If it is the Congress which has the sole power to authorize the courts to issue writs of habeas corpus, it would seem beyond question that the Congress also has the power to place reasonable restrictions upon the time within which, in any given case, the courts' authority to issue such writs must be invoked by aggrieved prisoners.

with the failure of Congress to create expanded exceptions as expressed by this Court in *Custis v. United States*, 511 U.S. 485, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994) ("Custis invites us to extend the right to attack collaterally prior convictions used for sentence enhancement beyond the right to have appointed counsel established in *Gideon*. This we decline to do.") does not inveigh in favor of excluding ineffectiveness claims from the sweep of the Congressional intent to limit the use of habeas corpus to claims less than one year old.

The holding announced by the Court, in *Maleng v. Cook*, 490 U.S. 488, 492, 109 S. Ct. 1923, 1926, 104 L. Ed. 2d 540 (1989) was straight-forward and direct:

> The question presented by this case is whether a habeas petitioner remains "in custody" under a conviction after the sentence imposed for it has fully expired merely because the prior conviction will be used to enhance the sentences imposed for any subsequent crime of which he is convicted. We hold that he does not.

This language seems to make it clear that a state prisoner does not remain "in custody" under a conviction after the sentence imposed for it has fully expired merely because of the possibility [or even the actuality[3]] that the prior sentence

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3. The Court observed that

> [s]ince almost all states have habitual offender statutes, and many states provide . . . for specific enhancement of subsequent sentences on the basis of prior

(Cont'd)

will be used to enhance the sentence imposed for any subsequent crimes of which he is convicted. Nevertheless the opinion then states that it "express[es] no view" on the extent to which an expired conviction could be challenged in the context of an attack on a current sentence.

What remains indefinite is how the Court's holding in *Maleng* is distinct from the point on which it purports to express no view. The only apparent reason for the prisoner in *Maleng* to have challenged an expired sentence was to escape a current sentence that was based on the expired sentence.

There is little room to suppose, much less to argue, that *Maleng v. Cook*, *supra*, extended the right to attack collaterally prior convictions used for sentence enhancement beyond the right to have appointed counsel established in *Gideon*. If *Maleng* had had the effect of so extending the right to attack collaterally prior convictions used for sentence enhancement, it would have been an anomaly for the Court, only five years later, in *Custis v. United States*, *supra*, to announce its refusal to acknowledge that the right of collateral attack had been so extended.

(Cont'd)

> convictions, a contrary ruling would mean that a petitioner whose sentence has completely expired could nonetheless challenge the conviction for which it was imposed at any time on federal habeas.

490 U.S. at 492. The viability of the Court's observation as just quoted in light of the one year time limitation imposed by the 1996 amendment to 28 U.S.C. § 2244(d)(1) may deserve the Court's consideration.

Because the Congress has acted (28 U.S.C. § 2244(d)(1) as amended), post-*Maleng* and post-*Custis*, to sharply limit the power of the courts in issuance of writs of habeas corpus in cases involving state court judgments to instances where the writ is applied for within one year, the inference should be strong that Congress, having explicitly limited collateral attacks to "fresh" state court sentences, intended that collateral attacks on "stale" state court sentences should not be countenanced as providing any basis for habeas relief.

The decision of the Third Circuit here, as well as the decisions of other circuits which do not regard *Custis* as having answered the question left open by *Maleng*, tend to create an enormous loophole in the amended statute by allowing review of expired sentences so long as the prisoner alleges a connection between present incarceration on a new offense and the prior conviction. If "the right to attack collaterally prior convictions used for sentence enhancement beyond the right to have appointed counsel established in *Gideon*" is not, henceforth, uniformly limited as it was limited in *Custis v. United States*, *supra*, whatever benefits Congress hoped would flow from the 1996 amendment requiring expeditious review of state criminal proceedings will be largely illusory.

Although *Maleng* did not expressly preclude such a challenge it now seems apparent, in light of *Custis* and the habeas statute itself (particularly through the congressional expression inherent in the amendment imposing a one year limitation) that the answer to the question presented in these proceedings should be that under all circumstances the custody requirement of the federal habeas corpus statute precludes a challenge upon a fully expired conviction for which the prisoner is no longer in custody that was used to enhance a current conviction under habeas attack and for which the prisoner is presently in custody.

2. Through analysis of the error, or not, in the rationale upon which the court of appeals grounded its decision, there emerges an independent array of reasons why the custody requirement of the federal habeas corpus statute should be held to preclude, under all circumstances, a challenge upon a fully expired conviction that was used to enhance a current conviction under habeas attack and for which the prisoner is presently in custody.

Although the question of whether the specific line of reasoning utilized by the court of appeals was or was not erroneous may usually be of secondary importance to any effort to answer the question presented in proceedings such as these, analysis of the circuit court's reasoning in this instance highlights additional basis for concluding that the federal habeas statute should, under all circumstances be held to preclude a challenge upon a fully expired conviction that was used to enhance a current conviction under habeas attack and for which the prisoner is presently in custody.

Unless the Court determines, in these proceedings, to depart substantially from the holding it reached in *Maleng v. Cook*, 490 U.S. 488, 492, 109 S. Ct. 1923, 1926, 104 L. Ed. 2d 540 (1989), the decision of the Court of Appeals for the Third Circuit should be reversed for the reason, independent of all others, that the pivotal ruling made in this case by the court of appeals misinterprets the holding of *Maleng v. Cook*, *supra*. This misinterpretation is in diametric opposition to the actual holding of *Maleng*.

The court of appeals, ruled that "A petitioner does, however, satisfy the 'in custody' requirement for federal habeas jurisdiction when he asserts a challenge to a sentence

he is currently serving that has been enhanced by the allegedly invalid prior conviction. [citing *Maleng* at 493]" (Pet. App. at 12a). The holding of the Supreme Court in *Maleng* is not to be found at page 493, [490 U.S. at 493] as cited by the Court of Appeals. The *Maleng* holding, to which the Third Circuit opinion made only passing reference (Pet. App. at 12a), is found at page 492 [490 U.S. at 492] where the Supreme Court stated:

> The question presented by this case is whether a habeas petitioner remains "in custody" under a conviction after the sentence imposed for it has fully expired merely because the prior conviction will be used to enhance the sentences imposed for any subsequent crime of which he is convicted. We hold that he does not.

Id., 490 U.S. at 492.

This holding, as just quoted from the *Maleng* opinion, is exactly the opposite of that which, in its quoted pivotal ruling, the Court of Appeals for the Third Circuit suggests the *Maleng* holding to have been. The quoted pivotal ruling of the Court of Appeals carries the implication, as applied to the facts of Coss' case, that despite any intervening unconditional release the collateral consequence of sentence enhancement is sufficient to render an individual "in custody" for purposes of an attack on an "allegedly invalid prior conviction." Such an implication is not in blatantly direct conflict with this Court's *Maleng* opinion, but the implication inherent in the Court of Appeals' ruling strongly appears to conflict with important recitals that immediately preceded the quoted holding in *Maleng*.

In *Maleng*, at the conclusion of the Court's analysis of *Carafas v. LaVallee*, 391 U.S. 234, 88 S. Ct. 1556, 20 L. Ed. 2d 554 (1968) the *Maleng* opinion set forth the following observations concerning *Carafas*:

> . . . We went on to say, however, that an unconditional release raised a "substantial issue" as to the statutory "in custody" requirement. [citation omitted]. While we ultimately found that requirement satisfied as well, we rested that holding *not* on the collateral consequences of the conviction, but on the fact that the petitioner had been in physical custody under the challenged conviction at the time the petition was filed. *Ibid.* The negative implication of this holding is, of course, that once the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual "in custody" for the purposes of a habeas attack upon it.

(Italics in original) *Maleng v. Cook*, *supra*, 490 U.S. at 492.

Unless one totally ignores the "negative implication" which the *Maleng* opinion, as just quoted, read into its *Carafas* analysis, the ruling of the Court of Appeals simply cannot be squared with the holding of *Maleng*. Relief from the "collateral consequence" of sentence enhancement arising solely by virtue of a completely expired prior sentence was the only relief which the Court of Appeals sought to bestow upon Coss.

The result in *Maleng*, which appears to differ significantly from the Court's page 492 holding (490 U.S.

at 492) is to be found at page 493 (490 U.S. at 493). It is upon the page 493 result rather than upon the Supreme Court's page 492 holding that the Third Circuit court seems to have relied.

A unique circumstance of Maleng's case (a circumstance not present in Coss' case) which enabled the Court to reach a result differing conspicuously from the Court's quoted holding was the fact that Mr. Maleng had been convicted by the State of Washington and sentenced in 1978 to a term in the Washington state prison which, at the time of the Court's *Maleng* decision, he had not yet begun to serve. Utilizing the rationale of *Peyton v. Rowe*, 391 U.S. 54, 88 S. Ct. 1549, 20 L. Ed. 2d 426 (1968) ("a petitioner who was serving two consecutive sentences imposed by the Commonwealth of Virginia could challenge the second sentence which he had not yet begun to serve"), the Court explained that although Mr. Meleng had not yet begun to serve his 1978 state court sentence, a detainer[4] had placed against him by the State of Washington

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4. The fact of this detainer was also vitally important to the result reached by the Court in *Maleng*, *supra*.

In *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 93 S. Ct. 1123, 35 L. Ed. 2d 443 (1973) the Court, as it duly explained in its *Maleng* opinion, had held

> that a prisoner serving a sentence in Alabama, who was subject to a detainer filed with his Alabama jailers by Kentucky officials was "in custody" for the purpose of a habeas attack on the outstanding Kentucky charge upon which the detainer rested. We think that *Braden* and *Peyton* together require the conclusion that respondent in this case was "in custody" under his 1978 state sentences at the time he filed.

Maleng v. Cook, *supra*, 490 U.S. at 493, 109 S. Ct. at 1926, 104 L. Ed. 2d 540.

(Cont'd)

with the federal authorities "to ensure that at the conclusion of [Maleng's] federal sentence he [would] be returned to the state authorities to begin serving his 1978 state sentences." *Maleng v. Cook*, *supra*, 490 U.S. at 493.

It seems evident that three factors enabled the Court, in *Maleng*, to reach a *result* which was at such conspicuous variance with the Court's *holding*, quoted earlier in this brief. Those three factors were:

a.) the 1978 state sentences which Mr. Meleng had not yet begun to serve but which he would be obliged to serve at the conclusion of his federal sentence,

b.) the detainer [see note 4 ante] which furnished the essential link between Mr. Meleng's then-present federal custody and the yet-to-be-served state custody which would immediately follow his federal custody and,

c.) the incidental fact that Mr. Maleng's habeas petition was a pro se petition which the Court treated with greater deference.

None of those three factors are present in the case of Mr. Coss.

Mr. Coss' 1986 conviction for simple assault is as final as it can be. Not only is all appeal concluded, but the sentence

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(Cont'd)

It appears to have been the detainer that provided the "connection" which, without interruption of custody, would link Mr. Braden's then present and immediate Alabama custody to the prospective custody inherent in the Kentucky sentence which he had not yet begun to serve.

has been completely served. The prisoner desires to revisit it now only because he chose to continue his criminal conduct, and his past has caught up with him.

Because the sentence based upon Coss' 1986 conviction has been completely served and Coss was "out on the streets" for a time following his 1986 incarceration, there is no detainer or any other similar custodial circumstance to provide the essential link or continuum between his 1986 sentence and his present custody.

Unlike Mr. Maleng's petition, Coss' petition is not pro se. Although Coss initially did file a pro se petition the matter is presently before the court on his second amended counselled petition.

Because none of the three factors which enabled the Supreme Court in *Maleng* to reach a result contrary to the Court's *Maleng* holding are present in the case of Mr. Coss, the reliance which the Court of Appeals (Pet. App. at 12a) placed upon the *result* in *Maleng* is, as a matter of law, clearly erroneous because such reliance is contrary to the *holding* of *Maleng*. On this basis alone, the decision of the Court of Appeals should be reversed.

There are, however, additional grounds which support reversal of the decision of the Court of Appeals. Principal among these additional grounds is the unwillingness of the Court of Appeals to be guided by the teachings of this Court as found in *Custis v. United States*, 511 U.S. 485, 114 S. Ct. 1732, 128 L. Ed. 2d 517 (1994).

Petitioner urged the Third Circuit, in the brief filed in that court, to be guided by the rationale of *Custis* in reaching

its decision[5], but the Third Circuit ignored *Custis* entirely. Instead (Pet. App. 12a-13a) the Third Circuit hinged this crucial aspect of its decision on its own "collateral consequences" rule developed for the Third Circuit in *Young v. Vaughn*, 83 F.3d 72, 78 (3d Cir. 1996) (holding that "a prisoner may attack his current sentence by a habeas challenge to the constitutionality of an expired conviction if that conviction was used to enhance his current sentence). The Third Circuit Court also (Pet. App. 12a) viewed its decision as being buttressed by *United States v. Tucker*, 404 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592 (1972). Four separate problems inhere in efforts to buttress *Young v. Vaughn* with *Tucker*.

In the first place, in *United States v. Tucker*, comity was not a consideration; comity is an important consideration here. Moreover here, unlike in *Tucker*, state officials and state sentencing procedures are closely implicated. The *Tucker* case presented a situation where the Ninth Circuit court, in an appropriate exercise of its supervisory powers over a subordinate federal court of the Ninth Circuit, had simply ordered the district court to sentence a federal prisoner on a federal conviction without reference to an invalid state court conviction. The reasoning employed by Judge Aldisert in an earlier opinion which he filed in this case is instructive to the point:

> The teachings of Tucker do not constitute an appropriate analogue to this case or any other

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5. The circumstance that Mr. Coss' 1986 sentence had been completely served, and Coss released from any custody long before he filed his federal habeas petition presents a case even stronger than that of Custis, who was still on state probation under the enhancing sentence when he was sentenced for his federal crimes. *See* 1994 WL 663719 at *9. The fact that habeas review was still available for the defendant in *Custis* does not mean that it is available for prisoners who wish to resurrect attacks on already expired cases.

> federal habeas case brought under §2254. United States v. Tucker by caption and by content was not a habeas case brought under §2254 based on a state conviction; the defendant there was seeking post conviction relief from a federal conviction pursuant to 28 U.S.C. § 2255. *This is a distinction with a fundamental difference.*

(Italics supplied).

* * *

> . . . In bringing his action, Tucker was attacking a federal sentence . . . that had been enhanced on the basis of invalid state court convictions. . . . Because the Court had no state officers as petitioners or respondents before it, the court lacked power or authority to give the option to a state court . . . to retry the defendant.

* * *

> . . . [T]he Court had no alternative other than to order that the defendant be resentenced on the federal conviction without reference to the invalid state court convictions.

(Pet. App. 29a-30a).

The quoted reasoning reinforces the conclusion that in *Tucker* the Ninth Circuit Court, as was its entitlement — perhaps its obligation — was simply exercising its "supervisory power" over the conduct of a federal district court in its jurisdiction. *See United States v. Hastings*, 461

U.S. 499, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983) (In the exercise of its supervisory powers, federal court may, within limits, formulate procedural rules not specifically required by the Constitution or Congress; the purposes underlying use of supervisory powers are to implement a remedy for violation of recognized rights, to preserve judicial integrity by assuring that a conviction rests on appropriate considerations validly before the jury, and to deter illegal conduct.).

In the second place, *Custis* held that *Tucker* is only relevant (constitutionally) when a *Gideon* violation is established. That, obviously, is not the case here.

As a third reason, it should be remembered that *Tucker* predated *Maleng*, which viewed the question presented as left open; the *Maleng* Court, therefore, plainly did not believe that *Tucker* already had resolved the question presented.

The fourth reason why *Tucker* ought not be given effect here is that the *Tucker* case was brought by a federal prisoner under the provisions of 28 U.S.C. § 2255. Here the habeas petition was brought by a state prisoner under the provisions of 28 U.S.C. § 2254.

The court of appeals interprets *Tucker* (Pet. App. 12a) as implicitly applicable to habeas cases brought under § 2254 based on a state conviction. In so doing, the court ignores the distinguishing factor that the defendant in *Tucker* was seeking post conviction relief from a federal conviction pursuant to 28 U.S.C. § 2255. In such process the court seems to have ignored that which Judge Aldisert had but recently declared was "a distinction with a fundamental difference." It appears that a similar distinction was found to be of no

consequence in *Maleng v. Cook*, but in *Maleng* this Court, as has been pointed out earlier in this brief, justified the result through the observation (490 U.S. at 493) that the State of Washington had placed a detainer with the federal authorities to ensure that at the conclusion of Maleng's federal sentence he would be returned to the state authorities to begin serving his 1978 state sentences.

Viewed in the context thus established, *Tucker* cannot fairly be regarded (*Maleng v. Cook*, notwithstanding) as constituting a holding by this Court that ". . . a prisoner could attack in a federal habeas proceeding an allegedly unconstitutional [state court] conviction, even if he has served in entirety the sentence resulting from the conviction, if that conviction had an effect on a present sentence." (Pet. App. at p.12a).

As a consequence of the foregoing analysis, it can be seen that the vitality of the Third Circuit "collateral consequences" rule, as promulgated in *Young v. Vaughn*, 83 F3d 72, 78 (3d Cir. 1996) (holding that a prisoner may attack his current sentence by a habeas challenge to the constitutionality of an expired conviction if that conviction was used to enhance his current sentence) is not supported by *Tucker* if the expired conviction is a state court conviction. Arguably, if the "housekeeping" aspects of *Tucker*, arising under the principles set forth in *United States v. Hastings*, *supra*, are considered, the vitality of the "collateral consequences" rule promulgated in *Young v. Vaughn*, *supra*, are not supported by *Tucker* in any event.

Moreover, it has been shown that the "collateral consequences" rule, as announced in *Young v. Vaughn*, *supra*, is plainly at variance not only with the rationale expressed in *Custis* but also with the *holding* of *Maleng*.

CONCLUSION

The judgment of the court of appeals should be reversed because Coss was not "in custody" under the judgment he sought to attack at the time he filed his habeas petition. The answer to the question presented by these proceedings should be that the custody requirement of the federal habeas corpus statute precludes, under all circumstances, any challenge upon a fully expired conviction that was used to enhance a current conviction under habeas attack and for which the prisoner is presently in custody?

Respectfully submitted,

WILLIAM P. O'MALLEY*
Assistant District Attorney
EUGENE M. TALERICO
First Assistant
District Attorney
ANDREW J. JARBOLA, III
District Attorney
LACKAWANNA COUNTY
DISTRICT ATTORNEY'S OFFICE
Lackawanna County Courthouse
200 North Washington Avenue
Scranton, Pennsylvania 18503
(570) 963-6717

Attorneys for Petitioners

* *Counsel of Record*